

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS  
FOR MONTGOMERY COUNTY, MARYLAND**

**Council Office Building  
100 Maryland Avenue  
Rockville, Maryland 20850  
(240) 777-6660**

**<http://www.montgomerycountymd.gov/ozah/index.html>**

**PETITION OF HUMBERTO LOSADA** \*  
**(d/b/a Mis Primeros Pasitos Family Day Care)** \*  
**for a special exception for a child day care** \*  
**facility (a group day care home) for up to** \*  
**12 children on property located at 2311** \*  
**Dennis Avenue, Silver Spring, Maryland** \*  
\* \* \* \* \*

Special Exception No. 14-03

Humberto Losada \*

In Support of the Petition \*

\* \* \* \* \*

Before: Martin L. Grossman, Hearing Examiner

**HEARING EXAMINER'S OPINION AND DECISION**

**TABLE OF CONTENTS**

	<b>Page</b>
I. STATEMENT OF THE CASE .....	2
II. FACTUAL BACKGROUND .....	3
A. Subject Property and Surrounding Neighborhood.....	3
B. The Proposed Use, Landscaping, Lighting, Signage and the Environment.....	7
C. Operational Characteristics .....	9
D. Community Reaction .....	14
E. Master Plan Conformance and Compatibility with the Neighborhood .....	14
III. FINDINGS AND CONCLUSIONS .....	15
A. Standard for Evaluation .....	16
B. Specific Standards .....	18
C. General Standards .....	21
D. Additional Applicable Standards .....	26
IV. DECISION.....	30

## I. STATEMENT OF THE CASE

Petition S.E. 14-03, filed on September 17, 2013, requests a special exception in the R-60 Zone to operate a “group day care home”<sup>1</sup> for up to 12 children in an existing single-family, detached home at 2311 Dennis Avenue, Silver Spring, Maryland. Petitioner Humberto Losada has been operating a licensed child care business (*i.e.*, a “family day care home”) in his home for up to 8 children since January 4, 2011 (Exhibit 5). It is called “Mis Primeros Pasitos Family Day Care.” A family day care home is a permitted use in the R-60 Zone, but increasing the number of children from 8 to 12 would transform the facility into a “group day care home” under Zoning Ordinance §59-A-2.1, and a special exception is required to operate a group day care home in the R-60 Zone. The property is owned by Petitioner, as evidenced by Maryland property records (Exhibit 4).

Under the provisions of the Zoning Ordinance §59-G-1.12, the Hearing Examiner is authorized to hear and decide this type of petition. On October 10, 2013, the Office of Zoning and Administrative Hearings issued a notice that the public hearing would be held before the Hearing Examiner on January 13, 2014, at 9:30 a.m., in the Second Floor Hearing Room of the Stella B. Werner Council Office Building (Exhibit 21).

The Technical Staff of the Maryland-National Capital Park and Planning Commission (“M-NCPPC”) reviewed the petition and, in a report dated December 6, 2013, recommended approval with conditions (Exhibit 22).<sup>2</sup> At its regular meeting on December 19, 2013, the Planning Board

---

<sup>1</sup> A “group day care home” is one of three types of “child day care facilities” defined in Zoning Ordinance §59-A-2.1. The other two are “family day care homes” for up to 8 children and “child day care centers” for 13 or more children. A “group day care home” is defined in §59-A-2.1 as:

A dwelling in which child day care services are provided:

- a. in the home where the licensee is the provider and is a resident;
- b. for 9 but not more than 12 children including the children of the provider, and;
- c. where staffing complies with state and local regulations, but no more than 3 non- resident staff members are on site at any time.

<sup>2</sup> The Technical Staff report is frequently quoted and paraphrased herein.

voted unanimously to recommend approval, with the same conditions recommended by Technical Staff (Exhibit 23). There has been no opposition to this application. Four letters of support were filed by parents utilizing the existing family day care. Exhibit 16.

The hearing was convened, as scheduled, on January 13, 2014, and testimony was presented in support of the petition by Petitioner Humberto Losada, who appeared *pro se*. There were no other witnesses. Petitioner adopted the findings in the Technical Staff report (Exhibit 22) and agreed to Staff's proposed conditions, as well as those suggested by the Hearing Examiner (Exhibit 25). Tr. 6-7. He also identified his plans and photos of the site, and he submitted an Affidavit of Posting (Exhibit 26). The record was held open until January 23, 2014, to receive sample contract language from Petitioner calling for staggered arrivals of children being dropped off or picked up by vehicle.

On January 21, 2014, Petitioner filed copies of contracts with parents specifying arrival and departure times, in accordance with the Hearing Examiner's instructions. Exhibit 27. The record closed, as scheduled, on January 23, 2014.

There is no opposition in this case, and the special exception is supported by the evidence in the record. The Hearing Examiner will therefore grant the petition, with conditions.

## **II. FACTUAL BACKGROUND**

### **A. Subject Property and Surrounding Neighborhood**

The subject site is located at 2311 Dennis Avenue, Silver Spring, Maryland. The legal description of the property is Lot 33, Block D of the Carroll Knolls Subdivision,<sup>3</sup> and it is zoned R-60. The property is well described by Technical Staff (Exhibit 22, p. 3):

The Site is located in the northeast quadrant of Dennis Avenue and Gardiner Avenue . . . [and t]he house's main entrance faces the intersection of Dennis

---

<sup>3</sup> In reviewing the file in this case prior to the hearing, the Hearing Examiner noticed that the Zoning Map (Exhibit 8) lists the property as Lot 20 of Block D, not Lot 33 of Block D, as listed in the Maryland tax records (Exhibit 4) and in the Technical Staff report (Exhibit 22). The Hearing Examiner e-mailed Technical Staff raising this issue and was informed that the Zoning map was in error and that it would be corrected by Technical Staff. Exhibit 24.

Avenue and Gardiner Avenue. The Site has two walkways that lead to the front entrance. One is from Gardiner Avenue by the parking pad and the other is on Dennis Avenue. The Site has one other walkway from Dennis Avenue to the basement at the rear of the house. The walkways are paved with concrete and are well-lit. Ground lights are located near each path and along the stone wall. The front yard is well-landscaped with multiple shrubs, shade trees and outside furniture.

The play area is located in the rear of the property closest to Gardiner Avenue. It is fenced in with an approximately four-foot white picket fence along Gardiner Avenue, an approximately six-foot wooden privacy fence on the neighboring property to the north, and an approximate four-foot chain link fence to the east.

An aerial photograph of the subject site was provided by Technical Staff (Exhibit 22, p. 3):





The site is depicted below in photographs supplied by Petitioner to Technical Staff (Exhibit 22, Attachment 4, and Tr. 22-23). The top photo is a view from the garden in front of the home, at the intersection of Gardiner and Dennis Avenues, and the bottom is a view from across Dennis Avenue:





The concrete pad reserved for drop-off and pickup of children during operational hours is depicted below in another of Petitioner's photos (Exhibit 17(b)(5)):



The fenced-in back yard and outdoor play area are shown below in an additional photograph supplied by Petitioner (Exhibit 17(b)(3)):



Technical Staff recommended defining the general neighborhood surrounding the subject property as bounded by Evans Drive to the north, Darrow Street to the south, Douglas Avenue to the east, and Haywood Drive to the west. The Hearing Examiner accepts Technical Staff's recommended definition of the general neighborhood, which Staff describes as "zoned R-60 and composed of one-family residential properties." The location of the site and the surrounding neighborhood are depicted in an aerial photo map from the Technical Staff report (Exhibit 22, p. 4):



Staff notes that there are two special exceptions in the general neighborhood, an accessory apartment special exception at 2421 Homestead Drive granted in 1985, and a boarding house for 3 or 4 tenants at 2410 Dennis Avenue, granted in 1976.

### **B. The Proposed Use, Landscaping, Lighting, Signage and the Environment**

Petitioner proposes to expand the existing "family day care home" for up to 8 children into a "group day care home" for up to 12 children. The daycare operates in the existing single-family home and in an outside play area, located in the spacious, fenced-in, back and side yards. The outdoor play area is designated on both the Site Plan (Exhibit 10) and the Landscape and Lighting

Plan (Exhibit 11), the latter of which is reproduced below:



The locations of the house, trees, play area, site-access, drop-off/pickup area and other features are shown on the above plan. No signage has been proposed for the site, and the Hearing Examiner has imposed a condition specifying that Petitioner may not display a sign for the child care



facility unless it is approved by the Department of Permitting Services and a permit is obtained. A sign, if erected, may not exceed two square feet and may not be lighted. A copy of the permit should be filed with OZAH before any sign is posted.

Petitioner testified that no external changes to the site are proposed, nor will additional outdoor lighting be installed, as there is already adequate lighting on the premises. Tr. 18.

Technical Staff found that (Exhibit 22, p. 6):

Lighting and landscaping on the property are adequate. There are solar powered lighting fixtures along the front and both sides of the house as well as along the pedestrian walkways leading to the house. Wall-mounted fixtures are also located on every side of the house and near the entrances. The property is well landscaped with trees, shrubs, flowers, manicured lawn, and outdoor décor/furnishings.”

There are no environmental issues because there will be no exterior changes. A Forest Conservation Exemption is in the record as Exhibit 13. As stated by Technical Staff (Exhibit 22, p. 6):

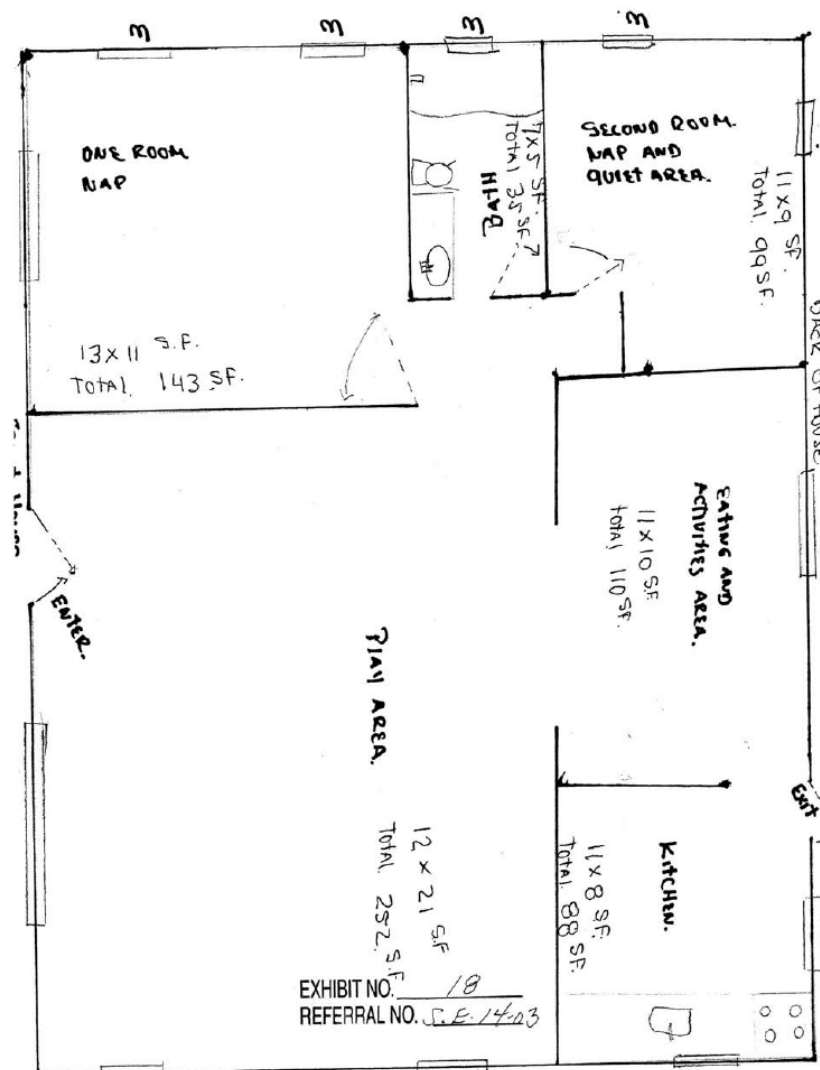
The Site contains no forest, streams, wetlands, or environmental buffers and is located in the Lower Rock Creek watershed; a Use I watershed. The proposed special exception is in compliance with the Environmental Guidelines, and it is not subject to Chapter 22A, Montgomery County Forest Conservation Law as the Site is less than 40,000 square feet in size.

### **C. Operational Characteristics**

Petitioner currently runs a family day care in his home for up to eight children. He is licensed by the State Child Care Administration to care for up to eight children, and his various certifications are spelled out in his resume (Exhibit 6). A copy of Petitioner’s current state license is in the record as Exhibit 14, and as required under Code §59-G-2.13.1(a)(4), the Petitioner has submitted an affidavit affirming that he will comply with all applicable State and County requirements (Exhibit 7). He also supplied a copy of the Fire Marshal’s inspection finding no violations as of May 7, 2012 (Exhibit 15).

Technical Staff reports that the proposed group day care will be located on the main floor of the house, which is where the existing day care is currently located. According to Staff, the main floor has an area of 727 square feet and contains a kitchen, bathroom, eating and activities room, nap/quiet area room, a second nap room, and an indoor play area. Entrance to the day care is through the house's front door. Petitioner will continue to use the basement as his personal residence, which can be entered directly from the rear of the house. Exhibit 22, p. 2.

The floor plan for group day care (Exhibit 18) is reproduced below, followed on the next page by photographs of some of the rooms (Exhibits 17(a)(2) and (4)):





In addition to the Petitioner, two non-resident staff have been employed to operate the child care facility, and no increase in the number of non-residential staff on site at any one time is proposed for the group day care home. The Hearing Examiner has imposed a condition which would allow Petitioner to have up to two non-resident staff members on site at any given time, but specifies that they must park on the street abutting the site because there is insufficient on-site parking available. This condition is consistent with both Zoning Ordinance Section 59-E-3.7 and Section 59-G-2.13.1(a).

Zoning Ordinance §59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member, in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. Section 59-G-2.13.1(a) provides that:

*The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in Section 59-E-3.7 is not necessary because:*

- (A) existing parking spaces are available on adjacent property or on the street abutting the site that will satisfy the number of spaces required; or*
- (B) a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems;*

Petitioner demonstrated, and Technical Staff confirmed, that there is ample parking on the streets abutting the subject site, Dennis Avenue and Gardiner Avenue. As stated in the Technical Staff report (Exhibit 22, p. 11), “Staff visited the Site and witnessed sufficient parking available on both streets during the parent drop-off and pick-up period and also witnessed an employee’s vehicle parked on Gardiner Avenue.” The photographic evidence taken during drop-off and pick-up times supports Staff’s finding (Exhibit 22, Attachment 5, pp. 1-4):



Zoning Ordinance §59-G-2.13.1(a)(3) also specifies that “an adequate area for the discharge and pick up of children [must be] provided.” Since the only area available for discharge and pick-up



of children is the on-site parking pad, the Hearing Examiner has imposed a condition providing that Petitioner must also park on the street during operational hours to leave the area of the on-site parking pad available for pick-ups and drop-offs of children. According to Technical Staff, this has been the practice at the facility (Exhibit 22, p. 2):

During the day care's hours of operation, the parking pad is reserved for parent drop-off and pick-up and the Applicant and his staff park on the street. The Applicant expects that the day care will continue to attract families in the area so many of the children will live close enough to be walked to the day care by their parents. Furthermore, the area is well-served by public transit with multiple Metrobus routes.

In light of these circumstances, the Hearing Examiner concludes that the two parking spaces for the non-resident employees required by Zoning Ordinance §59-E-3.7 may be located on the street abutting the site rather than on the site itself.

Based on this record, the Hearing Examiner finds that the subject site satisfies the Code requirements for parking spaces and that the drop-off/pickup spot will provide a safe area for the discharge and pick-up of children accessing the site by automobile. The minimal impact of the proposed special exception on the County's transportation facilities will be discussed in Part III. C. of this report.

The hours of operation for the proposed use are Monday through Friday, 7:30 a.m. to 5:30 p.m. Technical Staff reports that Petitioner currently uses a staggered parent drop-off and pick-up schedule and that he intends to have a similar schedule for the proposed group day care facility, although no more than five children are expected to use auto transportation. Exhibit 22, p. 2. Nevertheless, to minimize the possibility of any impact on the neighborhood from the additional arrivals and pick-ups, a condition of the special exception would require that any vehicular arrival and departure times for the children be staggered, through contractual agreement between the Petitioner and the parents, so that no more than five vehicles visit the site within any one-hour period

to drop off or pick up children. Petitioner has filed copies of his contracts with parents which contain a provision calling for staggered arrival times, in compliance with the Hearing Examiner's condition. Exhibit 27.

Petitioner testified that he has never had any complaints from the neighbors concerning traffic, parking, noise or anything else related to the child care facility. Tr. 29. Technical Staff evaluated the potential noise impact of outdoor play as follows (Exhibit 22, p. 6): "The play area is adequate and limited noise will be generated by the additional four children on the site."

Given the fencing, landscaping and configuration of the site, as well as Staff's evaluation, the Hearing Examiner finds that allowing Petitioner to have up to eight children in outdoor play at any given time would cause no disruption to the neighborhood. A condition of the special exception so provides. As is generally the case with this type of special exception, another condition prohibits the use of a public address system or amplified music outside the building and prohibits outdoor play before 9:00 a.m.

#### **D. Community Reaction**

There was no opposition to the proposed group day care home. On the contrary, four letters of support were filed by parents utilizing the existing family day care. Exhibit 16. They uniformly extol the virtues of Petitioner's child care operation.

#### **E. Master Plan Conformance and Compatibility with the Neighborhood**

The subject site is within the area covered by the Kensington-Wheaton Master Plan, approved and adopted in 1989. Technical Staff reports that the Master Plan does not specifically discuss the subject site, but its Community Facilities section notes a growing need for more child day care facilities in the area, and the Master Plan encourages the development of such facilities. Technical Staff quotes the Master Plan (Exhibit 22, p. 4):

One of its policies is to “Support efforts to utilize County zoning and development plan review processes to promote greater day care opportunities,” (p. 139). Furthermore, the Master Plan cites a 1987 Montgomery County Planning Board study which, “...suggested that none of the small-child care centers serving 7-20 children that were studied had a significant negative impact on the surrounding residential community,” (p.139).

The Hearing Examiner notes that a separate section of the Master Plan is devoted to “Child Day Care Facilities.” Plan, pp. 137-139. The Plan observes that there is “a need for additional child day care facilities and opportunities” (Plan, p. 137) in Kensington-Wheaton, and states as the Plan’s objective, “To promote greater day care opportunities through appropriate land use recommendations and associated policies.” Plan, p. 139. The Master Plan also recommends continuation of the R-60 Zone for the subject site (Plan, p. 69), and the R-60 Zone permits group day care homes by special exception.

Staff found that the proposed special exception for a group day care is consistent with the objectives of the Master Plan since it will increase the number of child day care facilities near major employment and commercial developments in the plan area.

In light of all these factors, it is fair to say that the proposed use is consistent with the objectives and recommendations of the 1989 Kensington-Wheaton Master Plan.

### **III. FINDINGS AND CONCLUSIONS**

A special exception is a zoning device that authorizes certain uses provided that pre-set legislative standards are met, that the use conforms to the applicable master plan, and that it is compatible with the existing neighborhood. Each special exception petition is evaluated in a site-specific context because a given special exception might be appropriate in some locations but not in others. The zoning ordinance establishes both general and specific standards for special exceptions, and the Petitioner has the burden of proof to show that the proposed use satisfies all applicable

general and specific standards. Technical Staff and the Planning Board concluded that Petitioner will have satisfied all the requirements to obtain the special exception, if he complies with the recommended conditions (Exhibits 22 and 23).

Weighing all the testimony and evidence of record under a “preponderance of the evidence” standard (Zoning Ordinance §59-G-1.21(a)), the Hearing Examiner concludes that the instant petition meets the general and specific requirements for the proposed use, as long as Petitioner complies with the conditions set forth in Part IV, below.

#### **A. Standard for Evaluation**

The standard for evaluation prescribed in Code § 59-G-1.2.1 requires consideration of the inherent and non-inherent adverse effects on nearby properties and the general neighborhood from the proposed use at the proposed location. Inherent adverse effects are “the physical and operational characteristics necessarily associated with the particular use, regardless of its physical size or scale of operations.” Code § 59-G-1.2.1. Inherent adverse effects, alone, are not a sufficient basis for denial of a special exception. Non-inherent adverse effects are “physical and operational characteristics not necessarily associated with the particular use, or adverse effects created by unusual characteristics of the site.” *Id.* Non-inherent adverse effects, alone or in conjunction with inherent effects, are a sufficient basis to deny a special exception.

Technical Staff have identified seven characteristics to consider in analyzing inherent and non-inherent effects: size, scale, scope, light, noise, traffic and environment. For the instant case, analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a “group day care home” use. Characteristics of the proposed facility that are consistent with the “necessarily associated” characteristics of group day care home uses will be considered inherent adverse effects, while those characteristics of the



proposed use that are not necessarily associated with group day care home uses, or that are created by unusual site conditions, will be considered non-inherent effects. The inherent and non-inherent effects thus identified must then be analyzed, in the context of the subject property and the general neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

Technical Staff identified the following inherent characteristics of a group day care home (Exhibit 22, p. 6): (1) vehicular trips to and from the site; (2) outdoor play areas; (3) noise generated by children; (4) drop-off and pick-up areas; and (5) lighting. To this list, the Hearing Examiner would add two more items – (6) available parking, either on the site or adjacent to it; and (7) a dwelling in which most of the services are provided. Since group day care homes vary only slightly in the number of children permitted (*i.e.*, from 9 to 12), and non-resident staff on site is limited to no more than 3 by Zoning Ordinance §59-A-2.1, there is not a great variety in the scale of group day care homes.

Technical Staff did not find any non-inherent adverse effects in this case (Exhibit 22, p. 6), and the Hearing Examiner agrees. While it could be argued that the availability of only two parking spaces on the site is a non-inherent site characteristic for a group day care home, the Hearing Examiner views the parking availability characteristic more broadly, given the flexibility of the parking requirement in Zoning Ordinance §59-E-3.7, which allows off-site parking to be counted if it is available on an abutting street. Thus, the Hearing Examiner finds that the ample availability of parking on streets abutting the site renders the overall parking characteristics of this site typical for the use and unlikely to cause non-inherent adverse effects, especially given the conditions imposed by the Hearing Examiner in this regard.

The remaining characteristics of the proposed use are consistent with the inherent characteristics identified for a group day care home. The building is not of an unusual size or design, but rather is an existing one-family residence in a residential area; the outdoor play area is fenced and screened, and the number of children using it at one time would be limited; adequate parking is provided abutting the site; the pick-up/drop-off area is located on the site, and with the mandated staggering of arrivals, it can accommodate the expected number of cars without queuing onto the public street; lighting is residential in style and will not be increased for this special exception; and the amount of additional traffic generated would not be unusual, nor would it pose a burden on public facilities. The Hearing Examiner concludes that the characteristics of the proposed special exception will not result in any adverse impacts upon the neighborhood, if the specified conditions are followed.

### **B. Specific Standards**

The specific standards for Child Day Care Facilities are found in Code § 59-G-2.13.1. The Technical Staff report, the Planning Board Letter, and the Petitioner's evidence provide adequate proof that the specific standards would be satisfied in this case, as outlined below.

#### **Sec. 59-G-2.13.1. Child day care facility.**

(a) *The Hearing Examiner may approve a child day care facility for a maximum of 30 children if:*

(1) *a plan is submitted showing the location of all buildings and structures, parking spaces, driveways, loading and unloading areas, play areas, and other uses on the site;*

Conclusion: The submitted Site Plan (Exhibit 10), Landscape and Lighting Plan (Exhibit 11), Floor Plan (Exhibit 18) and the photographic exhibits in the record satisfy this requirement.

(2) *parking is provided in accordance with the parking regulations of article 59-E. The number of parking spaces may be reduced by the Hearing Examiner if the applicant demonstrates that the full number of spaces required in section 59-E-3.7 is not necessary because:*

- (A) *existing parking spaces are available on adjacent property or on the street abutting the site that will satisfy the number of spaces required; or*
- (B) *a reduced number of spaces would be sufficient to accommodate the proposed use without adversely affecting the surrounding area or creating safety problems;*

Conclusion: Code § 59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. In this case, there is ample parking on the streets abutting the subject site, Dennis Avenue and Gardiner Avenue. As discussed on pages 11-13 of this Opinion, the Hearing Examiner finds that the two parking spaces for the non-resident employees required by Zoning Ordinance §59-E-3.7 may be located on the street abutting the site rather than on the site itself, without adversely affecting the surrounding area or creating safety problems. The Hearing Examiner therefore concludes that there are sufficient parking spaces available to satisfy the statutory requirement.

- (3) *an adequate area for the discharge and pick up of children is provided;*

Conclusion: As stated by Technical Staff and discussed on pages 12-13 of this Opinion, “The site has a two-car parking pad reserved for drop-off and pick-up of children during the day care’s hours of operation.” Exhibit 22, p. 13. The Hearing Examiner finds that this designated area is adequate, given the condition that neither the Petitioner nor his employees may park on that pad during operational hours.

- (4) *the petitioner submits an affidavit that the petitioner will:*
  - (A) *comply with all applicable State and County requirements;*
  - (B) *correct any deficiencies found in any government inspection; and*
  - (C) *be bound by the affidavit as condition of approval for this special exception; and*

Conclusion: The required affidavit has been submitted (Exhibit 7).

- (5) *the use is compatible with surrounding uses and will not result in a nuisance because of traffic, parking, noise or type of physical activity. The hearing examiner may require landscaping and screening and the submission of a plan showing the location, height, caliper, species, and other characteristics, in order to provide a physical and aesthetic barrier to protect surroundings properties from any adverse impacts resulting from the use.*

Conclusion: As discussed in Part II of this Opinion and Decision, the evidence demonstrates that the proposed use would be compatible with surrounding uses and would not result in a nuisance because of traffic or parking. As to noise and physical activity, it should be noted that the back yard is fenced and landscaped, so any noise would be mitigated, and the Hearing Examiner has included conditions prohibiting any amplified sound in the back yard and limiting the number of children in outdoor play to a maximum of eight at a time. Outdoor operations are limited to normal work hours, and the facility will not operate in the evenings, so the impact on the neighborhood is reduced. Technical Staff found (Exhibit 22, p. 14), and the Hearing Examiner agrees that,

*. . . no adverse impacts are expected from this proposed special exception. The proposed group day care will be compatible with the surrounding neighborhood and will not result in a nuisance because of traffic, parking, noise or type of physical activity.*

- (b) *A child day care facility for 31 or more children may be approved by the Board of Appeals subject to the regulations in subsection (a) above, and the following additional requirements: . . .*

Conclusion: Not applicable.

- (c) *The requirements of section 59-G-2.13.1 do not apply to a child day care facility operated by a nonprofit organization and located in: . . .*

Conclusion: Not applicable.



### C. General Standards

The general standards for a special exception are found in Code § 59-G-1.21(a). The Technical Staff report, the Planning Board Letter, the exhibits and the testimony of the Petitioner provide ample evidence that the general standards would be satisfied in this case.

#### Sec. 59-G-1.21. General conditions.

**§5-G-1.21(a)** *-A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:*

*(1) Is a permissible special exception in the zone.*

Conclusion: A group day care home use is a permissible special exception in the R-60 Zone, pursuant to Code § 59-C-1.31(d).

*(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.*

Conclusion: The proposed use complies with the specific standards set forth in § 59-G-2.13.1 for a Child Day Care Facility use as outlined in Part III. B, above.

*(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the Commission. Any decision to grant or deny special exception must be consistent with any recommendation in a master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.*

Conclusion: The subject site is within the area covered by the Kensington-Wheaton Master Plan, which was approved and adopted in May of 1989. For the reasons set forth in Part II. E. of this Opinion and Decision, the Hearing Examiner finds that the planned use, a group day care home in a single-family, detached home, is consistent with the goals of the Kensington-Wheaton Master Plan.

*(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions, and number of similar uses.*

Conclusion: The proposed group day care home will be in harmony with the general residential character of the neighborhood because it will be housed in an existing single-family home, and there will be no external changes to the structure. The rear yard play area is completely fenced in and well screened. Adequate parking is available on the abutting streets, and the site can handle the pick-up and drop-off of children without cars backing into the street. There are no other group day care homes in the general neighborhood, so there is clearly not an excess of similar uses. Exhibit 22, pp. 4 and 8.

*(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The Hearing Examiner concludes that the proposed use will not be detrimental to the peaceful enjoyment, economic value or development of surrounding properties at the site. As noted above, the proposed use will have almost no physical impact on the nearest residences. On the positive end, it will provide a community service recommended by the applicable Master Plan, as discussed on pages 14-15 of this Opinion.

- (6) *Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: Based on the nature of the use, it will not cause objectionable vibrations, fumes, odors and dust. As discussed in Part III.B of this Opinion, the special exception, as conditioned, will cause no objectionable noise or physical activity at the subject site. Technical Staff found that “[t]he proposed group day care facility will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare or physical activity at the Site. Outdoor play time will be limited. . . , with minimal or no disturbance to neighboring residences.” Exhibit 22, p. 8. No new lighting will be added, and operations cease at 5:30 p.m. The Hearing Examiner therefore finds that there will not be objectionable illumination or glare at the site as a result of the special exception.

- (7) *Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.*

Conclusion: Technical Staff did not report any other group day care homes in the neighborhood. There are two existing special exceptions in the neighborhood. One is for an accessory apartment and the other for a boarding house for 3 or 4 tenants (Exhibit 22, pp. 8-9), but these do not alter the predominantly residential nature of the area. The Hearing Examiner finds that the group day care home proposed in this case will not increase the number, scope, or intensity of special exception uses sufficiently to affect

the area adversely or alter the nature of the area. Moreover, as previously discussed, the proposed use is consistent with the recommendations of the Master Plan, and therefore, under the terms of this criterion, will not alter the nature of the area.

- (8) *Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.*

Conclusion: The evidence supports the conclusion that the proposed group day care home will not be a danger to public health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site. On the contrary, it will provide a needed service to the public.

- (9) *Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.*

Conclusion: Technical Staff reports that the site will be adequately served by existing public facilities. Exhibit 22, p. 9. There is no contrary evidence, and the Hearing Examiner so finds.

- (A) *If the special exception use requires approval of a preliminary plan of subdivision, the Planning Board must determine the adequacy of public facilities in its subdivision review. In that case, approval of a preliminary plan of subdivision must be a condition of the special exception.*
- (B) *If the special exception:*
- (i) does not require approval of a new preliminary plan of subdivision; and*
  - (ii) the determination of adequate public facilities for the site is not currently valid for an impact that is the same as or greater than the special exception's impact;*
- then the Board of Appeals or the Hearing Examiner must determine the adequacy of public facilities when it considers*

*the special exception application. The Board of Appeals or the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the Growth Policy standards in effect when the application was submitted.*

Conclusion: The special exception sought in this case would not require approval of a preliminary plan of subdivision, and there is no currently valid determination of the adequacy of public facilities for the site, taking into account the impact of the proposed special exception. Therefore, the Hearing Examiner must consider whether the available public facilities and services will be adequate to serve the proposed development under the applicable Growth Policy standards.<sup>4</sup> These standards include Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR). Transportation Planning Staff did do such a review, and concluded that the proposed use would add fewer than three additional trips during each of the peak-hour weekday periods. Exhibit 22, Attachment 6. Since the existing house, combined with the proposed use, would generate fewer than 30 total trips in the weekday morning and evening peak hours, the requirements of the LATR are satisfied without a traffic study. Since the proposed use is estimated to generate fewer than three additional peak-hour trips, TPAR is also satisfied without the payment of an impact tax. Therefore, the Transportation Staff concluded, as does the Hearing Examiner, that the proposed use “will have no adverse traffic impact on existing area roadway conditions or pedestrian facilities.” Exhibit 22, Attachment 6, p. 1.

Public facilities also include police, fire, and health facilities. The 2012-2016

---

<sup>4</sup> The Council changed the name for its “Growth Policy” to “Subdivision Staging Policy.” The version of that policy in force when the subject petition was filed was the “2012-2016 Subdivision Staging Policy,” adopted by the Council on November 13, 2012, in Resolution 17-601.

Subdivision Staging Policy provides that “[t]he Planning Board and staff must consider the programmed services to be adequate for facilities such as police stations, firehouses, and health clinics unless there is evidence that a local area problem will be generated.” Resolution 17-601, p. 21. There is no evidence in this case of a “local area problem” regarding police, fire or health services, so the Hearing Examiner finds that those public services are adequate as well.

- (C) *With regard to public roads, the Board or the Hearing Examiner must further find that the proposed development will not reduce the safety of vehicular or pedestrian traffic.*

Conclusion: Technical Staff found that, “With the recommended conditions of approval, the proposal will not reduce the safety of vehicular or pedestrian traffic . . .” Exhibit 22, p. 9. The evidence of record supports that finding, and the Hearing Examiner therefore concludes that the proposed use would have no detrimental effect on the safety of vehicular or pedestrian traffic.

#### **D. Additional Applicable Standards**

##### ***59-G § 1.23. General development standards***

- (a) ***Development Standards.*** *Special exceptions are subject to the development standards of the applicable zone where the special exception is located, except when the standard is specified in Section G-1.23 or in Section G-2.*

Conclusion: The proposed use meets the development standards of the R-60 Zone, as shown in the following Chart from Page 10 of the Technical Staff report (Exhibit 22):



**Table 1: Applicable Development Standards – R-60 Zone**

<b>Development Standards</b>	<b>Required</b>	<b>Provided</b>
Maximum Building Height: (§59-C-1.327)	35 feet	14 feet
Minimum Net Lot Area: (§59-C-1.322 (a))	6,000 sq. ft.	9,162 sq. ft.
Minimum Lot Width at Front Building Line (§59-C-1.322 (b))	60 feet	±95 feet
Minimum Lot Width at Street Line (§59-C-1.322 (b))	25 feet	±88 feet
Minimum Setback from Street (Dennis Ave): (§59-C-1.323(a))	25 feet	±29 feet
Minimum Setback from Street (Gardiner Ave): (§59-C-1.323(a))	25 feet	25 feet
Minimum Setback from Adjoining Lot: (§59-C-1.323 (b)(1))	8 ft. one side, 18 ft. sum of both sides	±11 feet on Dennis Avenue side, ±36 feet sum of both sides
Minimum Rear Yard Setback: (§59-C-1.323 (b)(2))	20 feet	±38 feet on Gardiner Avenue side
Maximum Building Coverage: (§59-C-1.328)	35%	10.93%
Off-Street Parking Requirement (§59-E-3.7)	Dwelling: 2 Employee: 2	2 off-street <sup>1</sup> 2 on-street <sup>1</sup>

<sup>1</sup> The Applicant is proposing to use on-street parking to satisfy the off-street employee parking requirement. This will require a parking reduction from the Hearing Examiner per §59-G-2.13.1.

- (b) ***Parking requirements.*** *Special exceptions are subject to all relevant requirements of Article 59-E.*

Conclusion: Zoning Ordinance §59-E-3.7 requires that a group day care home provide one parking space for every non-resident staff member, in addition to the residential parking requirement, but allows the required number of spaces to be provided on the street abutting the site. As stated by Technical Staff (Exhibit 22, p. 11), “The Applicant has submitted photographs showing sufficient parking available during the existing day care’s hours of operation, which will be the same hours as the proposed group day care’s hours (Attachment 5). Furthermore, Staff visited the Site and witnessed sufficient parking available on both streets during the parent drop-off and pick-up period and also witnessed an employee’s vehicle parked on Gardiner Avenue.” As previously discussed, the Hearing Examiner finds that there is sufficient parking to meet the code requirements and to ensure safety.

(c) ***Minimum frontage.*** *In the following special exceptions the Board may waive the requirement for a minimum frontage at the street line if the Board finds that the facilities for ingress and egress of vehicular traffic are adequate to meet the requirements of section 59-G-1.21:*

- (1) *Rifle, pistol and skeet-shooting range, outdoor.*
- (2) *Sand, gravel or clay pits, rock or stone quarries.*
- (3) *Sawmill.*
- (4) *Cemetery, animal.*
- (5) *Public utility buildings and public utility structures, including radio and T.V. broadcasting stations and telecommunication facilities.*
- (6) *Riding stables.*
- (7) *Heliport and helistop.*

Conclusion: This special exception is not included in the above list. Moreover, the proposed use will not result in any change in the site’s frontage, which meets required standards.

(d) ***Forest conservation.*** *If a special exception is subject to Chapter 22A, the Board must consider the preliminary forest conservation plan required by that Chapter when approving the special exception application and must not approve a special exception that conflicts with the preliminary forest conservation plan.*

Conclusion: Technical Staff determined that this project is exempt from the forest conservation regulations (Exhibits 13 and 22, p. 12).

- (e) ***Water quality plan.*** *If a special exception, approved by the Board, is inconsistent with an approved preliminary water quality plan, the applicant, before engaging in any land disturbance activities, must submit and secure approval of a revised water quality plan that the Planning Board and department find is consistent with the approved special exception. Any revised water quality plan must be filed as part of an application for the next development authorization review to be considered by the Planning Board, unless the Planning Department and the department find that the required revisions can be evaluated as part of the final water quality plan review.*

Conclusion: Inapplicable. This provision applies only to sites where there will be land disturbance within a Special Protection Area, which is not the case here.

- (f) ***Signs.*** *The display of a sign must comply with Article 59-F.*

Conclusion: Petitioner does not propose any signs. A condition has been imposed which provides that Petitioner may not display a sign for the child care facility unless it is approved by the Department of Permitting Services and a permit is obtained. A sign, if erected, may not exceed two square feet and may not be lighted. A copy of the permit should be filed with OZAH before any sign is posted.

- (g) ***Building compatibility in residential zones.*** *Any structure that is constructed, reconstructed or altered under a special exception in a residential zone must be well related to the surrounding area in its siting, landscaping, scale, bulk, height, materials, and textures, and must have a residential appearance where appropriate. Large building elevations must be divided into distinct planes by wall offsets or architectural articulation to achieve compatible scale and massing.*

Conclusion: There will be no external building modifications, so the building will maintain its residential character.

- (h) ***Lighting in residential zones.*** *All outdoor lighting must be located, shielded, landscaped, or otherwise buffered so that no direct light intrudes into an adjacent residential property. The following lighting*

*standards must be met unless the Board requires different standards for a recreational facility or to improve public safety:*

*(1) Luminaires must incorporate a glare and spill light control device to minimize glare and light trespass.*

*(2) Lighting levels along the side and rear lot lines must not exceed 0.1 foot candles.*

Conclusion: Technical Staff concluded that “direct lighting is not intruding into any adjacent residential property. Most of the lights on the property are located near the walkways and along the front yard, and have glare shields. Those closest to the neighboring property on the east are buffered by evergreen hedges. The four wall-mounted lights, one on each side of the house, are directed down to the property and have glare shields.” Exhibit 22, p. 13. The Hearing Examiner therefore finds that there will not be objectionable illumination or glare at the site as a result of the special exception.

Based on the testimony and evidence of record, I conclude that the group day care home use proposed by Petitioner, as conditioned below, meets the specific and general requirements for the special exception, and that the Petition should be granted, subject to the conditions set forth in Part IV of this Opinion and Decision.

#### IV. DECISION

Accordingly, based on the foregoing findings and conclusions, the Petition of Humberto Losada (Petition No. S.E. 14-03) for a special exception in the R-60 Zone to operate a group day care home for up to 12 children in an existing single-family detached home, at 2311 Dennis Avenue, Silver Spring, Maryland, is hereby **GRANTED**, subject to the following conditions:

1. The Petitioner shall be bound by all of his testimony and exhibits of record, and by his representations identified in this Opinion and Decision.

2. In accordance with Code § 59-G-2.13.1(a)(4), the Petitioner shall be bound by the Affidavit of Compliance submitted in connection with this case, Exhibit 7, in which Petitioner certified that he will comply with and satisfy all applicable State and County requirements, correct any deficiencies found in any government inspection, and be bound by the affidavit as a condition of approval for the special exception.
3. The group day care home use may not have more than 12 children on site at any one time; nor shall the number of children exceed the number authorized by State licensing authorities. The ages of the permitted children will be determined by State licensing authorities.
4. Physical improvements are limited to those shown on the site plan and landscape plan submitted with the application.
5. The hours of operation are limited to Monday through Friday, 7:30 A.M. to 5:30 P.M.
6. Vehicular arrival and departure times for the children must be staggered, through contractual agreement between the operator of the day care home and the parents, so that no more than five vehicles visit the site within any one-hour period to drop off or pick up children. In no event may a child be dropped off before Petitioner or a staff member is present to supervise that child; nor may a child be left alone if a parent is late in making a pick-up.
7. Petitioner may have up to two non-resident staff members on site at any given time, and they must park on the street abutting the site, in accordance with Zoning Ordinance §59-E-3.7. Petitioner must also park on the street during operational hours to leave the area of the on-site parking pad available for pick-ups and drop-offs of children. In light of this condition, the two parking spaces for the non-resident employees required by Zoning Ordinance §59-E-3.7 are hereby allowed to be located on the street abutting the site rather than on the site itself.
8. Children must be accompanied by an adult to and from the child-care entrance.

9. Petitioner shall not use a public address system of any kind outside the building, nor shall any amplified music be played outside the building.
10. All children must be under the direct supervision of a staff member at all times. No more than 8 children shall be permitted to play outdoors at any one time. Outdoor play times must not start before 9:00 a.m. All gates or other access to the outside play area must be secured during outdoor play in a manner that will prevent any of the children present from opening such access and wandering off.
11. The Petitioner shall maintain the grounds in a clean condition, free from debris, on a daily basis.
12. Petitioner may not display a sign for the child care facility unless it is approved by the Department of Permitting Services and a permit is obtained. A sign, if erected, may not exceed two square feet and may not be lighted. A copy of the permit should be filed with OZAH before any sign is posted.
13. Petitioner must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the special exception premises and operate the special exception as granted herein. Petitioner shall at all times ensure that the special exception use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements.

Dated: February 6, 2014



---

Martin L. Grossman  
Hearing Examiner



### **NOTICE OF RIGHT TO APPEAL**

Any person, board, association, corporation or official aggrieved by a decision of the Hearing Examiner under this section may, within ten days after this decision is rendered, appeal the decision to the County Board of Appeals in accordance with the provisions of Section 59-G-1.12(g) of the Zoning Ordinance.

cc:     Petitioner  
          All parties of record  
          The Planning Board  
          Department of Permitting Services  
          Department of Finance  
          All parties entitled to notice of filing